Supreme Court, U.S.
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OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

Robert F. Baron
Petitioner

v.

Department of the Interior
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Robert F. Baron
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24pp

QUESTIONS PRESENTED FOR REVIEW

Introductory Statement

Subsequent to the attacks on the United States, on September 11, 2001, jobs of all GS-6 guides at Hoover Dam were eliminated due to an absence of tours. A RIF (reduction in force), was instituted on October 12, 2001, to effect this action. Subsequent to the RIF announcement, but prior to its effective date of January 4, 2002, modified tours resumed at Hoover Dam on December 12, 2001.

Question 1.

Whether the RIF letter dated October 12, 2001, meets the procedural and substantive due process tests required by the Fifth Amendment of the United States Constitution.

Question 2.

Whether the Department of the Interior adhered to federal law and regulations in their termination, demotion, transfer and hiring of Hoover Dam employees following the attacks on the United States on September 11, 2001.

Question 3.

Whether the 23 page script submitted by petitioner as evidence was relevant and substantial, clear and convincing evidence to establish fact that work that resumed on December 12, 2001, was substantially same work as performed prior to September 11, 2001.

LIST OF PARTIES TO THE PROCEEDINGS

Solicitor General of the United States
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950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Department of the Interior
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U. S. Merit Systems Protection Board
Docket Number SF-0351-02-0208-I-1
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Final Order of November 22, 2002
Susanne T. Marshall, Chairman
Beth S. Slavet, Member

U. S. Court of Appeals for the Federal Circuit
Docket Number 03-3098
Robert F. Baron v. Department of the Interior
Opinion Filed and Judgment Entered on May 12, 2003
Before Michel, Lourie, and Gajarsa, Circuit Judges

U. S. Court of Appeals for the Federal Circuit
Docket Number 03-3098
Robert F. Baron v. Department of the Interior
Order—Petition for Rehearing Denied
June 4, 2003 (s) Jan Horbaly, Clerk

U. S. Court of Appeals for the Federal Circuit
Docket Number 03-3098
Robert F. Baron v. Department of the Interior
Judgment Affirmed
July 3, 2003 (s) Jan Horbaly, Clerk

JURISDICTION

Jurisdiction of the Court invoked under authority of 28 U.S.C. § 1254 and §2106, to review judgment of U. S. Court of Appeals for the Federal Circuit entered May 12, 2003. Petition for rehearing timely filed, denied June 4, 2003.

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND REGULATIONS

Constitution of the United States, Amendment V, Due Process Clause—No person shall…be deprived of life, liberty, or property, without due process of law;

5 U.S.C. §7703 Judicial Review of Decisions of the Merit Systems Protection Board

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the Court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(3) Unsupported by substantial evidence.

28 U.S.C. § 1254 Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 2106 Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such

further proceedings to be had as may be just under the circumstances.

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(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

28 U.S.C. Appendix—Rules of Evidence

Rule 102 Purpose and Construction

These rules shall be constructed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 401 Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 501 General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privileges of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

5 C.F.R. § 230.401

Agency authority to take personnel actions in a National emergency disaster.

(a) Upon attack on the United States, agencies are authorized to carry out whatever personnel activities may be necessary to the effective functioning of their organizations without regard to any regulation or instruction of OPM.

(b) Actions taken under this section shall be consistent with affected regulations and instructions as far as possible under the circumstances and shall be discontinued as soon as conditions permit the reapplication of the affected regulations and instructions.

(c) An employee may not acquire a competitive civil service status by virtue of any action taken under this section.

STATEMENT OF THE CASE

Petitioner received RIF (Reduction in Force) letter dated October 19, 2001, informing him that his GS-6 job will be abolished effective January 4, 2002, because of "absence of tours" at Hoover Dam resulting from "tragic events of September 11th," offering him a GS-5 job in lieu of separation, and warning him that failure to respond by October 19, 2001, will be interpreted as a declination of job offer.

The RIF letter offered no citation of law or regulation to support the action.

Petitioner signs letter only to learn that "absence of tours" resulted in only all GS-6 guides losing jobs.

Subsequent to signing letter, but prior to January 4, 2002, date of abolishing of his job, tours of Hoover Dam and Powerplant

resume in a changed format. Petitioner believes that this resumption of tours, substantially same work as prior to events of September 11, 2001, means RIF will be rescinded because reason for RIF, "absence of tours," no longer exists. Upon inquiring of personnel office it RIF was rescinded, petitioner was informed it was not, because, "this RIF is not about money."

At this point petitioner decides to appeal to Merit Systems Protection Board, and does so at earliest permissible date, January 5, 2002, offering in support of his belief that the work he is doing is substantially same work as prior to September 11, 2001, the 23 page script of required programs to be performed each day in revised tour. Daily presentation time has been effectively doubled, and each tour time lengthened.

Merit Systems Protection Board denies appeal and affirms agency's RIF.

On appeal to United States Court of Appeals for the Federal Circuit, the Court Affirms decision of Merit Systems Protection Board.

In both of the above decisions, the only concrete, substantial evidence, the 23 page script petitioner submitted with his original appeal to the Merit Systems Protection Board, was neither mentioned or alluded to.

ARGUMENT FOR GRANTING PETITION

Petitioner prays that Court may grant Writ in order that Court may discover that one opinion below is based on fabrications in other opinion below.

It is not evident which statute or regulation agency relied on when instituting the RIF. There are specific provisions relative to attack on the United States (5 C.F.R. §230.401), but agency has not mentioned them, and that is why the questions of due process and adherence to federal law and regulation arise.

Because the 23 page script, which is the only substantial (28 U.S.C. § 7703), and relevant (28 U.S.C. Appendix—Rules of Evidence, Rules 102, 401, 501), evidence in support of petitioner's case, was not alluded to in either of the opinions below, the question regarding whether it truly is substantial and relevant enough to establish fact that work performed after RIF was substantially same as work performed prior to events of September 11, 2001, arises.

Hoover Dam is an icon to the world of American genius, ingenuity and perseverance. The guides at Hoover Dam put an American face on Hoover Dam. The GS-6 guides, some of whom have worked there for decades, have shared American dreams and values with millions of people from all over the world.

It is not an exaggeration or stretch of reality to assert that a decision of this Court in this case has an impact far beyond the borders of Nevada and Arizona, the site of Hoover Dam.

Because the attacks on the United States on September 11, 2001, were unprecedented, petitioner believes the RIF action taken in response to those attacks was also unprecedented. For that reason, petitioner respectfully suggests that this may be a case in which a summary reversal of the judgment below could be considered. May it affect all who were demoted by the RIF? [28 U.S.C. Appendix, Rules of Appellate Procedure, Rule 3 (c) (3)].

APPENDIX

United States Merit Systems Protection Board
Docket number SF-0351-02-0208-I-1
Robert F. Baron v. Department of the Interior
May 8, 2002

Initial Decision
Introduction
On January 5, 2002, the appellant filed a timely appeal of the agency's Reduction in Force (RIF) action that changed him from a position of Reclamation Guide, GS-0090-06, to the lower-graded position of Reclamation Guide, GS-0090-05, effective January 4, 2002. The Board has jurisdiction over this appeal pursuant to 5 C.F.R. § 351.901. The appellant waived his right to a hearing, and the record in this matter closed on May 6, 2002. (Footnote—This was the last day for receipt of final submissions from the parties. See IAF, Tabs 14, 16). For the reasons set forth below, the agencies action is affirmed.

Analysis and Findings, Background
The undisputed record evidence establishes that the appellant formerly served as a Reclamation Guide, GS-0090-06 (intermittent), with the Department of Interior, Bureau of Reclamation, at the Visitor Services Office of Hoover Dam in Boulder City, Nevada. See Agency File (Footnote---The Agency File is located at Tab 3 of the Initial Appeal File), Tab 4b. By letter dated October 12, 2001, the agency notified the appellant that his position would be abolished via RIF, effective January 4, 2002. The agency's RIF notice explained that: After the tragic events of September 11th, the Department of Interior, in consultation with managers of Reclamation, decided to cease guided tours at all power facilities throughout the nation. This decision was made with the safety of the American people at

heart. The absence of tours has created a surplus of positions at the Visitor Center at Hoover Dam.

See id., Tab 4d. The RIF notice also advised the appellant that, in lieu of separation, he was being offered the position of Reclamation Guide, GS-0090-5 (intermittent), in the Visitor Services Office. Further, the agency's notice advised the appellant that he would be entitled to grade retention for a period of two years from the effective date of the action. See id.

The appellant subsequently filed this appeal. After several clarifying telephone conferences and written submissions, it was determined that the appellant was not challenging the agency's application of RIF procedures under 5 C.F.R. Part 351. See IAF, Tabs 1 (Appellant's Petition for Appeal), 4 (Appellant's "Response to Agency Response"); 7 (Summary Telephonic Status Conference), 9 (Notice Explaining Issues of Case), and 12 (Summary of Conference Call and Order Closing the Record). Rather, the only appealable issue raised by the appellant is whether the agency properly invoked RIF procedures. Specifically, the appellant argues that the agency's stated reason for the RIF is false.

Applicable Law

The agency must follow RIF procedures when it releases an employee from his competitive level by separation, when the release is required by lack of work, shortage of funds, insufficient personnel ceiling, or reorganization. See 5 C.F.R. §351.201. The agency has the burden of proof, by preponderant evidence, that it properly invoked the RIF regulations. See Willson v. Department of the Army, 25 M.S.P.R. 167, 170 (1984).

The agency may establish a prima facie case by coming forward with evidence showing that the RIF was undertaken for any of the reasons specified in 5 C.F.R. § 351.201(a). Once an agency makes a prima facie showing that it invoked RIF procedures for

a legitimate management reason, as it has done so here, the burden shifts to the appellant to come forward with evidence to rebut the agency's position. See Decker v. Department of Health and Human Services, 40 M.S.P.R. 199, 127(1989). The agency then has the burden of showing that the RIF was actually taken for the stated reason, subject to the appellant's right of rebuttal. See, e.g. Green v. District of Columbia Gov't, 6 M.S.P.R. 102 (1981).

However, once the agency establishes that it invoked the RIF regulations for one of the legitimate management reasons specified in 5 C.F.R. § 351.201(a), the Board has no authority to review the management considerations which underlie that exercise of agency discretion. Griffin v. Department of Agriculture, 2 M.S.P.R. 168, 171 (1980). (Footnote—In most cases, the agency only needs to establish that the RIF was taken for bona fide management reasons in order for the action to be sustained. However, an otherwise bona fide RIF affecting several employees becomes invalid with respect to a specific employee, such as the appellant, if he was included in the RIF solely for reasons that are personal to him. See Carter v. Department of the Army, 62 M.S.P.R. 393, 399 (1994), citing Gandola V. Federal Trade Commission, 773 F. 2d 308, 312 (1985). The evidence of record establishes, and it is undisputed, that the appellant does not argue that he was included in the RIF solely for reasons that are personal to him). It is well-settled that the agency, not the Board, is responsible for deciding whether to abolish or retain particular positions. See Holmes v. Department of the Army, 41 M.S.P.R. 612, 615 (1989, aff'd, 914 F 2d 271 (Fed Cir. 1990) (Table).

Discussion

The agency's stated reason for the RIF in the appellant's October 12, 2001 RIF notice, was a "surplus of positions resulting from the agency's decision to cease guided tours at Hoover Dam, for security reasons, in the aftermath of the September 11th terrorist attacks. See Agency File, Tab 4d. I

find that this explanation in the RIF notice, showing that the RIF was undertaken for one of the legitimate management reasons specified in the RIF regulations, (i.e., a lack of work), satisfies the agency's prima facie case.

The appellant argues, however, that the agency's reason for the RIF—a lack of tours—is not true, because after the RIF was effected, guided tours resumed at Hoover Dam. See IAF, Tab 8. He also contends that his agreement to accept a GS-5 position, in lieu of separation, was "illegal" since the initial reason for the RIF (a lack of tours) no longer existed. He also argues that he is essentially performing the same duties as a GS-5 Reclamation Guide that he performed as a GS-6 guide, and that in fact, the amount of time he spends giving presentations has actually increased. See IAF, Tab4. Although he was provided an opportunity to do so, the appellant has not provided any further evidence in support of these arguments. See IAF, Tabs 12, 16 (Orders closing record on April 17, 2002 and extending close of record to May 6, 2002).

In response, the agency has provided a sworn affidavit from Linda D. Limneos, the Director of Visitor Services at Hoover Dam. Ms. Limneos explains that she is responsible for all business aspects of the Visitors Center, and that she was instrumental in carrying out the Hoover Dam RIF at issue. In her affidavit, Ms. Limneos describes the agency;s decision-making process leading up to the RIF. She states that, on September 11th, shortly after the attack, she met with a management team at Hoover Dam to discuss the impact of the attack on Dam operations. Also on that date, a decision was made by the Secretary of the Interior to close the Dam to the public. The employees were released from work (on paid administrative leave) for two days, when they returned, Ms. Limneos states that she found temporary detail assignments for the Visitors Center staff. She explains that on September 26, 2001, while the Dam was still closed to the public, the

management team (of which she was a member) met with the Engineering and Operating Committee, which is the group that funds the Dam. At this meeting, Mr. Limneos explains, "we recognized that if it was a long term situation that the power plant was not going to be open, it was our fiduciary responsibility to carry on with a reduction in force, and so the decision was made to go forward (as) if the Center (would not be) opened to normal business operation." She further states that the facility "has not returned to normal business operations since September 11, 2001." See IAF, Tab 17.

With respect to the RIF, Ms. Limneos states in her affidavit that she developed staffing scenarios based on two different assumptions. One assumption involved running the visitors center with "hard-hat" tours, which were "premium tour(s) that took visitors to areas of Hoover Dam that subsequent to September 11, (2001) have been determined to be targets subject to terrorist attacks." She explains that she made a determination of the positions that would be needed if the Dam was no longer running these tours, but still going "less involved tours" at the Dam. The second alternative was to run the Visitors Center with no tours in the power plant. See IAF, Tab 17.

Finally, Ms. Limneos states that, after she developed these two scenarios and discussed them with management at Hoover Dam, higher-level agency officials made the decision to issue RIF notices based upon the second assumption (i.e., that there would not longer be any tours of the power plant). She then provided Human Resources Specialist Gloria Dunbar, who was to perform the actual mechanics of the RIF, with a list of the 21 positions that would remain in the Visitors Center after the RIF was effected. See IAF, Tab 17. The record reflects that, under this scenario, all GS-6 Reclamation Guide positions were identified for abolishment. See Agency File, Tab 4e (Retention Register).

In support of its reasons for the RIF, the agency has also submitted a memorandum, dated November 5, 2001, from John W. Keys, III, Commissioner of the Bureau of Reclamation. This memorandum is directed at Carl Buchholz, Executive Secretary of the Office of Homeland Security, and concerns "Department of Interior Dams and Security Measures." In the memorandum, Mr. Keys states that in response to the events of September 11th, Reclamation facilities were immediately moved to a higher level of security, with key dam and power plant facilities (including Hoover Dam) moved to Threat Condition 4 (footnote—The memorandum describes five levels of "Threat Conditions," from "Threat Condition Normal" to "Threat Condition 4" (on a 1-4 scale), with the highest demanding the most stringent security measures. See IAF, Tab 10), which "entailed limiting access to essential personnel only and having around-the-clock surveillance by armed law enforcement officers," as well as halting all tours and closing visitors centers. The memorandum also reveals that in the weeks that followed, Hoover Dam was downgraded to Threat Condition 3, where it remained as of November 4, 2001. This condition is declared "when an incident occurs or when intelligence is received indicating that some form of terrorist act is imminent and targeting of U. S. facilities is present." See IAF, Tab 10.

The agency has also submitted an article from the U. S. Bureau of Reclamation Regional Report, dated December 14, 2001. This article notes that on December 12, 2001, Secretary of Interior Gale Norton announced that Hoover Dam would be re-opened to limited tours, i.e., a modified version of the tour that was offered prior to September 11, 2001, with only "limited access" into the dam and power plant. Secretary Norton noted that "the events of September 11 dictate that the more traditional dam tours will not be resumed." See IAF, Tab 10.

Findings

I find that the agency has established, by preponderant evidence, that it invoked the RIF for legitimate management

reasons, i.e., a lack of work following the cessation of tours at Hoover Dam after the September 11, 2001 terrorist attacks. See 5 C.F.R. § 351.201(a). Based on the evidence provided by the agency, including the affidavit of Ms. Limneos, I find that the agency had a legitimate business purpose for reducing surplus tour guide positions after national security considerations necessitated the cessation of public tours, and the uncertainty as to when, and if, these tours would be resumed.

With respect to the appellant's contention that he was essentially performing the same duties as a GS-5 Guide that he was performing before the RIF, as a GS-6 Guide, such a claim is a legitimate challenge to the bona fides of a RIF action. See, e.g., Holmes, 41 M.S.P.R. at 616-17. However, the appellant acknowledged that, while the number of tours increased, the length of each tour was shorter (from 60 minutes to 15 minutes), which is consistent with the agency's explanation that the tours were shorter and less complex. He also acknowledges that the GS-5 tour guides were given prepared scripts to memorize, while the GS-6 guides typically were not. See IAF, Tab 1. Also, it is undisputed that the "hard-hat tours inside the power plant, described by Ms. Limneos as the "premium tours, have been permanently modified to offer visitors only limited access to the Dam due to security measures. Most important, while the appellant was provided ample opportunity to bolster his claim that he was essentially performing the "same" duties as before September 11, 2001, such as position descriptions, affidavits, or other evidence, he declined to do so. Thus, I find that the appellant has not shown that the duties he is currently performing, as a GS-5 tour guide, are identical to the ones he previously performed as a GS-6 tour guide.

Rather, as the agency has established, the essential function of the GS-6 tour guides we to provide tours of the Dam itself, and it was precisely this function that was not needed after the agency closed off public access to the Dam due to security

reasons. As the agency has explained, the Visitors Center at Hoover Dam can be accessed without the need to enter the Dam itself. See Agency File, Tab 1 (Narrative Statement). Thus, when the decision was made to cease tours a the Dam, there remained the need for a small number of tour guides at the Visitors Center, and the agency elected to keep those positions (the GS-5 guide positions) that would remain even if tours were not conducted within the Dam, and abolish the GS-6 positions, which it had determined were surplus positions due to the closure of the Dam to the public. The GS-5 position that the appellant was assigned to via RIF procedures was one of the positions that remained at Hoover Dam, and it was encumbered by another employee.

I further find that the resumption of tours on a limited basis, subsequent to September 11, 2001, does not impact, in any way, the legitimacy of the RIF. It is undisputed that, while tours resumed, they were of a more limited nature. Moreover, as I have found, the appellant has not demonstrated that his GS-6 tour guide position has been re-established. See, e.g., Williams v. Veterans Administration, 4 M.S.P.R. 333, 335 (1980) (the fact that agency may have increased staffing levels subsequent to a RIF taken due to insufficient personnel ceiling does not invalidate the RIF action, where appellant did not establish any subsequent staff increase would reestablish the position she formerly had).

Accordingly, because I have found that the agency properly invoked the RIF regulations, and the appellant has not challenged the application of those regulations (i.e., his assignment rights), I find no error in the agency's action. See Holmes, 41 M.S.P.R. at 617.

Decision
The agency's action is affirmed.
For the Board (s) Joanna M. DeLucia, Administrative Judge

United States Merit Systems Protection Board
Docket Number SF-0351-02-0208-I-1
Robert F. Baron v. Department of the Interior
November 22, 2002
Before: Susanne T. Marshall, Chairman
Beth S. Slavet, Member

Final Order

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, sections 1201.115 (5 C.F.R. § 1201,115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R.. § 1201.115(d). Therefore we deny the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. (5 C.F.R. § 1201.113.

For the Board: (s) Bentley M. Roberts, Jr., Clerk

United States Court of Appeals for the Federal Circuit
Docket 03-3098
Robert F. Baron v. Department of the Interior
Decided May 12, 2003
Before Michel, Lourie, and Gajarsa, Circuit Judges

Per Curiam

Robert F. Baron petitions for review of a final decision of the Merit Systems Protection Board ("Board"), Baron v. Dep't of the Interior, SF-0351-02-0208-I-1 (MSPB, Nov. 22, 2002), upholding the Department of Interior ("agency") decision to invoke the reduction-in-force ("RIF") regulation and abolish Mr. Baron's GS-6 Reclamation Guide position. After reviewing Mr. Baron's arguments, we conclude that there is substantial evidence to support the Board findings that (1) the agency had legitimate business reasons to conduct the RIF; and (2) the legitimacy was not affected by limited resumption of certain public tours months after a complete suspension of all tours for security reasons following the terrorist attacks of September 11, 2001. The Board decision is therefore affirmed.

Background

Mr. Baron worked as a GS-6 tour guide at the Hoover Dam, as an employee of the Department of Interior, Bureau of Reclamation. On September 11, 2001, all tours of the Hoover Dam were suspended. By letter dated October 12, 2001, the agency notified Mr. Baron that his position would be abolished via a RIF, explaining that the absence of tours had created a surplus of positions. The RIF was effective on January 4, 2002. Mr. Baron was offered, and he accepted, a position as a GS-5 Reclamation Guide. The dam reopened for limited public tours on December 12, 2001.

Mr. Baron appealed his downgrade under the RIF to the Board on January 8, 2002, claiming that his GS-6 position should not have been eliminated because tours later resumed at Hoover Dam. On May 8, 2002, the administrative judge ("AJ") found that the agency had undertaken the RIF for a legitimate management reason and in accordance with 5 C.F.R. § 351.201(a). The AJ also concluded that Mr. Baron had not established that his duties as a GS-5 Reclamation Guide were the same as his duties as a GS-6 Reclamation Guide. Further, the AJ found that the resumption of tours only on a limited

basis, as of December 12, 2001, did not impact the legitimacy of the RIF, and that Mr. Baron did not demonstrate that his GS-6 position had been re-established. As a result, the AJ found no error in the agency's action.

The AJ decision became final when, on November 22, 2002, the Board denied Mr. Baron's petition for review. Mr. Baron timely appeals the Board decision.

Discussion

The court's review of a Board decision is limited. A Board decision must be sustained unless it is: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. §7703(a) (2000). Moreover, an agency is accorded "wide discretion in conducting a reduction in force; absent a clear abuse of that discretion, a substantial departure from applicable procedure, a misconstruction of governing statutes, or the like, we do not upset a final agency decision." Markland v. Office of Pers. Mgmt., 140 F 3d 1031, 1033 (Fed. Cir. 1998) (citation omitted).

Mr. Baron does not allege a misconstruction of governing statues, nor do we see any. Neither do we see a substantial departure from applicable procedures or a clear abuse of discretion in the agency's RIF action. Mr. Baron seems only to argue that the Board decision is not supported by substantial evidence because some tours at the dam resumed on December 12, 2001. However, Ms. Linda Limneos, Director of Visitors Services at Hoover Dam, declared that management officials at Hoover Dam decided to conduct a RIF due to the impact of the events on September 11, 2001. Thus, there is substantial evidence to support the Board finding that the RIF was invoked for legitimate management reasons, i.e., a lack of sufficient work following the cessation of tours at Hoover Dam after September 11, 2001. There is also substantial evidence to

support the Board finding that while some tours resumed, they were of a more limited nature. Mr. Baron did not provide any evidence that tours resumed to the extent and volume they had before September 11, 2001.

Mr. Baron also contends that the government improperly cites as the reason for the RIF the elimination of "hard hat tours, (footnote—Premium tours that took visitors to the areas of the Dam such as the power plant), while the RIF letter from the agency only referred to cessation of "guided tours." Mr. Baron further argues that he expected good faith action in his employer to recreate his GS-6 position. However, as we noted above, the record contains substantial evidence to support the Board finding that the legitimacy of the RIF was not affected by the limited resumption of tours. Additionally, the Board did not abuse its discretion in concluding that Mr. Baron's GS-6 Reclamation Guide position had not been re-established. Mr. Baron does not dispute the Board finding that the "hard hat" tours inside the power plant had been permanently modified to offer visitors only limited access to the dam, and that the essential function of the GS-6 tour guides was to provide tours of the dam itself, which function was not longer needed after the agency closed off public access to the dam due to security reasons.

United States Court of Appeals for the Federal Circuit
Docket 03-3098
Robert F. Baron v. Department of the Interior
Order
Before Michel, Circuit Judge, Lourie, Circuit Judge, and Gajarsa, Circuit Judge.
A petition for rehearing having been filed by the petitioner, upon consideration thereof, it is ordered that the petition for rehearing be, and the same hereby is, denied. The mandate of

the court will issue on July 3, 2003, unless another time becomes appropriate under Rule 41.

For the Court (s) Jan Horbaly, Clerk

United States Court of Appeals for the Federal Circuit
Docket 03-3098
Robert F. Baron v. Department of the Interior
Judgment
On appeal from the Merit Systems Protection Board in Case No. SF0351020208-I-1, this cause having been heard and considered, it is ordered and adjudged: Affirmed.
Entered by order of the Court.
May 12, 2002
Issued as a mandate: July 3, 2003
(s) Jan Horbaly, Clerk